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# Discussion following the Remarks of Mr. Phillips and Ms. Erickson

Discussion

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## DISCUSSION FOLLOWING THE REMARKS OF MR. PHILLIPS AND MS. ERICKSON

MR. BARRETT: Thank you, Professor. Any questions? Professor King.

PROFESSOR KING: Yeah, I had a question on intellectual property. Isn't it true that U.S. intellectual property protection is broader than Canada's? In other words, aren't there differences in the scope of intellectual property protection in this area, which involves living things frequently? I think that makes a difference, doesn't it?

MR. PHILLIPS: Yeah. I mean, the intellectual property system is fairly complex. I mean, it is not just patents and plant breeders' rights, but we have somewhat different sets of structures in both countries, and then different again from the international system or other countries.

In Canada, we have very similar definitions of what's patentable, except that we haven't gone as far along as allowing patents on multi cellular organisms. We've gone up to and including patenting of singular cellular organisms. With the Harvard Mouse case that went through the Supreme Court last year, the judgment was that the Patent Act was never intended to deal with multi cellular organisms.

Now, we've got a reference on the Schmeiser case, which relates to - really doesn't relate to patenting at all, or the patenting of higher life forms, but it's been construed in the Supreme Court appeal as relating to patenting of higher life forms.

And in that case, they want to bring the bar back from ameiosis closer to the single cellular organisms, because there's gray area there. We know ameiosis isn't allowed under the decision, but a single celled organism is. So where's the line? Is it single celled or is it multi celled, not sentient? You know, that is the debate that is going on. The effect of that could be very large or very small.

Practically speaking, it is not that big a deal for the products that are in the markets today in the agri-food world, because there are other protection mechanisms. You can use contracts; you can use a whole variety of ways of stopping people from reproducing your technology. But in the long run, if you can't get patents that are clear and succinct, the industry says that they will be less interested in investing money in research that only has application in Canada. So we may get me, too, research, but we won't get research into products that are critically important to Canada more than the United States.

PROFESSOR KING: Problem for the future.

MR. PHILLIPS: Yeah.

A SPEAKER: I have a question on that subject. What is the rationale for denying patents to higher life forms in Canada?

MR. PHILILPS: There may be a lawyer here who deals with this. I have read the judgment. It has a variety of different rationales, but essentially, they have said that they can't find within the Patent Act, which was written quite a while ago, any intent of the legislators that it was to include living matter.

And then they looked at Canada's accession to the UPOV 78 version, which says that that's one way of handling living matter. And they say that the combination of those two things suggests that it wasn't the intent of Parliament to have patents on multi cellular organisms.

Now, as with many legal cases, the reference, the Schmeiser reference in the Supreme Court could change that. I mean, the view of the legal scholars I work with is that the judgment, the majority opinion was not a very well-structured and strong opinion, and that the minority opinion was a stronger opinion.

Now, since that judgment came down, two of the Justices who were on the majority side have left the Court. And so when the next case comes along, there will be a new configuration. And those who like to speculate are saying that the Court may have taken the Schmeiser reference simply to delimit the earlier decision, to say that there was something unique about it, and that doesn't apply to all multi cellular organisms. That's what the scholars seem to be musing about. We will know in 4, 5 or 6 months.

MR. BARRETT: Okay. Other questions?

MR. CARMODY: Yes. I had a question for Audrae. Audrae, you did a very good job of summarizing for us the sort of state of Canada-U.S. trade in the agriculture area. At a symposium I attended a couple of months ago it was described - it was described that we have in North America what is essentially a North American managed trade agreement in agriculture.

And I was wondering how much further are we going to go with this managed trade, and when will it become truly free?

MS. ERICKSON: I think that is a very timely question, really. I've thought a lot about that, actually. And, clearly, in the United States right now with the trade agenda that President Bush is embarking upon, everybody's pushing for free trade, where we go to zero on everything, but is it happening? Well, no, clearly, not in agriculture anyway. There are certainly exceptions where there are TRQ's.

And it's interesting the resounding rejection of that principle. And it wasn't too long ago where we ended up with the same, clearly, with Canada because there were, obviously, sectors in agriculture in which we never agreed to go to complete an open trade. So it's certainly something that is reoccurring.

And then as we encounter the disputes, and now I look more south of the border but, with Mexico with respect to NAFTA, but managed trade is becoming more the accepted principle and becoming an expectation. If it can be done once, if you can go back and revisit like in the poultry sector between the United States and Mexico, there was a safeguard action, but it essentially rewrote the tariffs from now - they didn't go to free trade in 2003 in poultry, our exports to Mexico. It pushed it out till at least 2008, at least, but that created an expectation of other sectors. And I would expect to see more of that, probably not less.

And, certainly, the United States concluded free trade talks, anyway, with Australia, and, at least - well, a couple of sectors were - it got down to a managed trade, one was no trade. So, personally, from my personal perspective, I hope not to see too much of that, but I'm afraid we will.

MR. BARRETT: Yes, sir.

MR. McILROY: My name's Jim McIlroy. I'd like to just follow on that exchange, in that we started this conference off by talking about the Canada-United States Free Trade Agreement and the NAFTA and how - where do we go from here. And one of the things that was left off the table back then, 15 years ago, was agriculture. And as you just mentioned, Audrae, I'm not at all optimistic anything is going to happen rapidly there.

You mentioned the Australian Free Trade Agreement where the usual suspects sugar, dairy, et cetera, were not included. In Canada, we have a case where our Prime Minister very proudly asserted that we were going to eliminate all tariffs on the agricultural products of the poorest countries in Africa. But if you read the small print, he excluded poultry and dairy.

So that all of the international trade initiatives that we're seeing right now are carving these sectorial interests off. And I guess my question to you is that the WTO negotiations, whether they be in services, industrial goods or whatever, everybody is saying, the developing countries in particular, are saying we're not going to make any moves at the WTO until we get something on agriculture.

Whereas, on the other hand, your Australian FTA, and our Prime Minister's very generous gift to the poorest of the poor countries in Africa, always carve these sectors out. And I'm just wondering is agriculture going to continue to hold the WTO hostage? I don't see any evidence of the contrary. And I'm wondering if you see any.

MS. ERICKSON: Well, one thing I can tell you with certainty because of this coalition that I Chair on that very topic, the WTO negotiations are extremely important to agriculture. Mind you, these are not negotiations where we'll go to zero tariffs, of course, any time soon. You know, we just had agriculture as a sector added during the Uruguay Round.

But you will see there that even for the United States, and you could certainly speak from the Canadian perspective, that you will see our most sensi-

tive commodities certainly on the table. Absolutely. How much so? I think it's going to be a number of other factors that are going to push things.

In the United States, you know, some of our farmers are very wedded to the Farm Bill. Mind you, we don't subsidize everything in agriculture as you know, but the grains sector, and sugar, and dairy, and just a few others. But they - the appropriations will not be there. The budget will not be there for those commodities that receive a payment of some kind. So there's going to be that kind of pressure domestically in the United States.

And it behooves us, certainly, to run to the WTO as fast as we can and trade off something, because we're far better off by lowering the barriers and having access to Asia, and dealing with some issues with Europe, I think, in the medium to long-term, which is clearly what the WTO negotiations are going to take.

MR. PHILIPS: You both raised an interesting point. The economic historians have coined the phrase or examined the history of negotiating access in various sectors. And some of them have argued that if you want to understand the trade-offs that society's willing to make, look at your tariff book. Don't look at your Constitution. The tariffs are where the real debate lies.

And to some extent, that's not a bad way of looking at the agri-food sector. There are certain sectors that are politically, or socially, or economically important. And at this point, nobody's willing to put them on the table in any substantive way. And that may change, but as was observed, agriculture has only really been in place since '95, and many of the adjustments haven't fully been made yet.

And so we're 40 years after the first industrial agreement on lowering tariffs. It took them 40 years to go from an average of 50 to around 4 or 5 percent tariff rates, where we started at, in some of the product lines, way over 200 percent tariff rates once we tariffed all the quantitative export restraints or quota systems.

So we've got a lot of room to go. Will we actually cut them to the point where we actually get some trade? That's where it gets into the managed world. You start playing with the rules to get at least a token amount of trade in a product area, so you can find out if - where is the cut point for effective production.

So there's a - as long as we've got such large quotas, we're probably going to have an effectively managed outcome until you get down to a point where the market forces start to push supply and demand.

MS. ERICKSON: One of the hottest topics in agriculture negotiations in the WTO is the concept of developing country. And, you know, for some of these commodities, I mean, I'm telling you that a lot of the sectors in the United States look towards Brazil and say, well, wait a minute, you know, they're pretty export competitive in soybean meal, for example, and corn and poultry, for heaven's sakes, and beef, and other commodities, why should

they get developing country status? It's the intractability of some of those countries not wanting to - and India, as well, not wanting to look at some of these issues. It's going to be very difficult to resolve and sell back at home. But I think it can be done. But how ambitious will it be? That's really the question. How depressing.

MR. DELAY: Well, my name is Brenden Delay. I'm not a farmer, but I have three questions. First, if the United States is exporting so much more agricultural export goods to Canada, does that mean that the Canadians are getting larger?

MS. ERICKSON: No, no, we own the obesity problem right here.

MR. DELAY: And the second question, is it the Anglophones, or they keep a - well, they're getting larger.

And the third is a serious one. It's regarding the distinction between an agricultural and an industrial good. Right now, a lot of farmers, particularly in Upstate New York, dairy farmers, are making a big push regarding casein imports, because casein, which is the protein by-product out of milk, is certainly an additive to cottage cheese and many food goods, but it's also an additive to glues, it's an additive to certain plastics and certain polymers. And there's been a very massive increase in casein imports in the last 4 years or so. And what foreign countries are saying is, oh, no, no, this is not an agricultural good. This is something that's just widely used across the industry. Whereas, the dairy farmers are saying, well, if you continue to keep pushing this in, particularly from Australia, you're going to drive half of us out of business very quickly because we're operating on such thin margins.

So do you see like maybe a 201 proceeding happening with casein, or do you see that we need to look at our laws regarding what is the classification of an agricultural good versus an industrial good? And does that relate to patenting, as well?

MS. ERICKSON: Well, I guess either can happen. I haven't heard rumblings lately of a 201, largely because I think there was Senator Grassley, I believe, in the United States, had pushed to have sort of like an investigation to try to cool off the political pressure that had created over the issue. This is an example, although I'm not as close to it now as I was when I left the Farm Bureau, I tell you it was a lightning rod politically that seemed to be out of scope with its economic significance, really, as an issue from the dairy producers' perspective. It was just huge as if it was the *cas du jour* of whatever was wrong with, you know, the dairy industry, or any challenges that they were having. It was all because of NPC's. You know, the answer was just fix the NPC problem.

Clearly, that's not the answer. I don't know where the issue will go. I think that this little - I guess it's like a section, is it 233, sort of like an investigation that ITC does without any injury or anything like that, but just to try to write about or document what's really happening.

And I think that will be enormously helpful, because there are two very strong sides to the debate within the United States, and they play against one another. And that's why we haven't seen much movement. That being, the industry represented largely by the International Dairy Foods Association, the processors, who disagree with producers at the dairy industry in the United States. So they play against one another politically.

You know, when we have problems like this in the United States, I would imagine it's true somewhat as well in Canada, but you have a problem, your first solution run to the Hill. You know, it's very interesting. And then your second solution, if that doesn't work, or even if it does, get a WTO case or something.

But the challenge with some of these issues is they go on and on and on for many, many marketing cycles. And when there really is an issue with significant economic impact, and a solution that could be enforced through dispute settlement mechanisms, they take so long, three to four years. And oftentimes now, we're learning certainly in our industry, that at the end of the day - you know, we went to the WTO once against Mexico, for example, on an issue on sweeteners. Four years later, hundreds of millions of dollars in legal expenses and what do they do? The day that they were to lift their dumping duties, they simply substituted the measure to another one that was distinctly different, this time of tax, and we were forced to start over. And so we have.

And that's one thing, I think; that the WTO rules didn't contemplate in the dispute settlement understanding is what happens when there's this endless loop, you know, because countries can be very creative. And when it comes to agriculture and the immense politics that that brings about, you would expect that type of a result.

MR. PHILILPS: Let me add one extra point. That is, that different countries have different levels of responsiveness to industrial pressures. And the U.S. system is more open than many others. Many cases, there's a judgment that, somewhat in a protected part of the system, will make and say we're not going to take that case. You know, you might think you've got a point; we're not going to proceed with it.

In the U.S. system, there's a much stronger push to take - as long as you're willing to fund it and push it, you can take it as far as you want. And that means that not only does the U.S. get frustrated with Mexico when it happens, it means Canada gets frustrated with the United States when it happens.

And you've seen that in the context of the Canadian Wheat Board, which has - I've lost track of how many challenges there have been, but as long as you find a different reference period, you can take the case back, because it's not practices in general, it's practices for a specific period of time in a specific market that you can challenge.

And so every time there's a decision in favor of the Board in that case, or in favor of some of the other commodities that have moved down, somebody will come along and say, okay, you didn't cheat. You didn't play unfairly there, now let's take the next 4 months or 8 months and do it over again.

So it becomes a revolving process. And it's an industry for some parts of Washington and some parts of the legal fraternity. So there isn't any pressure to take it off, because you can keep a market effectively closed for an extended period of time, or at least keep a market unstable and reduce the competition from some of your importing partners.

MR. BARRETT: Gentleman.

MR. SMITH: Brad Smith. I'm not in my legal capacity, in my agricultural capacity this time. I'd like to follow up on that a little and find out if you have any comments on the political influences in Washington that come to bear on these questions. And I'll tell you why, because it cuts pretty close to home.

You've mentioned on the one hand the integration of Canada and the United States in terms of agricultural production and marketing. You've mentioned the supply chain and so forth.

My neighbor who has about 1,200 head of heifers that he has to move because they are ready to go to milking parlors, cannot move those heifers into the United States and Mexico where his market is. And he has been stuck for months begging his neighbors to take a few and milk them. But, nevertheless, being totally frustrated. And the last time I talked to him saying I don't know what's happening. I have no information.

And I said, look, I think you have a problem, not so much in Ottawa, but you have a problem in Washington. My suspicion is that as long as the trade in cattle can be cut back, it's advantageous to producers south of the border. And this north/south link is cut across by other circumstances.

And I wonder if you have any comment to make on the political situation in Washington with respect not only to BSE, but to other matters.

MS. ERICKSON: Well, we are knee deep in the silly season right now. And this would be the last moment in time, or certainly a moment in time when the White House and the Administration wouldn't want to take on issues if they didn't have to. You know, especially - and it's no matter their significance or their legal merits or whatever, economic significance, but it comes down to a calculation clearly of who am I going to make mad, or you know, who can I buy off or who - it's absolutely a trade-off like that all the time. I hate to admit it, but, you know, sometimes we all cause it ourselves because it's a system that we've created, and that it works to someone's gain at any point in time.

On the Canadian Wheat Board case, when that case - when they took that to the WTO, and I hope there's no press here, because I'll lose a lot of friends back home - but it surely seemed to me like one that, you know, on



its merits, it really wasn't there. They weren't going to win, that the Canadian Wheat Board was operating somehow in a non-commercial manner.

But it was the time of when, you know, the White House was trying to get trade promotion authority. So steel case, you know. And the White House had to work very hard on the Farm Bill and get passage of the Farm Bill, because, you know, they needed to get the support for the trade promotion authority.

And the Canadian Wheat Board, Senator Baucus, you know, Senate Finance Committee Chairman, didn't hurt, he wanted that case more than anything. So there they went, headlong into it.

MR. PHILILPS: Yeah, I think the system clearly has more ability in the United States to be pushed into making - to addressing some of the concerns of individual producers and regional groups.

I think where Canadians have sometimes been a little bit naive is that we've assumed all we have to do is work with the Administration, and that everything else will fall into line, because that's somewhat like it does work in a British Parliamentary system, where you have unification of administrative and legislative power. You don't have that in the United States. And as a result, you have to work the system.

We've had different efforts, sometimes more successful, sometimes less successful, in trying to build coalitions for a resolution of a dispute. But as long as there's a legal basis for the dispute, and there is in the SPS Agreements, what they're doing is probably legal. But are they doing it fast enough to satisfy people? No. But you're not going to - there's no way to push the system in the way it's structured right now for someone who wants to get back into the U.S. market.

PROFESSOR KING: You may have to take a few of these heifers yourself back.

MR. SMITH: I told them I wasn't going to help them.

MR. BARRETT: How much time do we have, Henry? I'll take one more question. Jim.

MR. McILROY: I just want to provide Brad's neighbor some neighborly advice. I wouldn't blame Washington on this, quite frankly, in that I go back to the dairy decision that Audrae discussed.

That decision said that Canadian farmers who are part of the supply management system cannot export their products because they're cross subsidized. If you're under supply management, you have a sweetheart domestic price of 60 cents that they were using to cross subsidize exports worth 20 to 30 cents.

You cannot export cattle to the United States right now. However, you can export milk. But the milk has to come from farmers who are not part of the supply management system. Your neighbor's problem is that his friendly supply management farmers, and he's probably one of them, want to put

anybody who's not part of the supply management system out of business, because they see it as threatening their supply management business. And, therefore, no Canadian farmer can buy his cattle.

His solution is to have a Canadian buy his cows, milk those cows, and export the milk or the cheese product or whatever to the United States. Because I don't see the U.S. border opening any time soon.

His problem is a domestic supply management problem. I wouldn't blame Washington on this one, although, I tend to blame them on most matters whenever my clients ask me. On this one, I think you guys are clean, Audrae.

MR. SMITH: If I could just have one last supplementary, because I read in the paper just the other day where the best part of agriculture had, I understood it, in effect, cleared the way for cattle exports. And my suspicion is, of course, that won't do anything much, because if you can keep the prices high in your domestic market, if the local producers can do that through their political representatives, nothing much is going to happen anytime soon.

I don't disagree with the point that's just been made except to say, this is what I wanted to underline, I've got a neighbor who is in the supply chain who stopped producing milk, who stopped milking, and who went into a very fine, specific kind of production in the supply chain where he is producing one product for export, in effect, and he is stuck.

MS. ERICKSON: Well, you know, this is another opportunity for the 2 countries to work collaboratively together, because these kinds of pressures created by a real SPS concern, obviously, initially, and then a couple layers of, you know, supply management on top of it.

But, you know, the opportunity to work together to reopen a very important market to the United States and Canada, obviously, on the beef side of this equation after BSE, would be Japan. And the way, you know, you can create some pressure outlets, open up some valves there to kind of reduce the pressure, it begins to help in other ways that are unintended and certainly indirect.

MR. PHILILPS: Yeah, we have other areas where SPS issues have come up where we found partial solutions to reopening the market. You create catch me areas where the risk is deemed to be evident or plausibly there, and then restrict trade and marketing from that area. I mean, there are ways of doing it if there's a will. The challenge is that there's no requirement you do that. That's only if you choose to do it. And right now, there isn't the will.

PROFESSOR KING: Well, that was a very good session. I hope you'll stay around for our next session which involves the testimony from Gwitchin Indians who have come 2 days' travel time from the Yukon. This was an excellent session.

Thank you.

(Session concluded)

